United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2299

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2299

REID L. FELDMAN, ADM'R
Plaintiff-Appellee

vs.

ALLEGHENY AIRLINES, INC.
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANT

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MAR 3 1975

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STATEMENT OF ISSUES

The defendant wishes to rebut certain arguments made in points II and III of the plaintiff's brief concerning inflation, the government pay tables, and the vicissitudes of life.

ARGUMENT

1. Discount Rate — Inflation

The choice of an appropriate discount rate in a death case is not the same type of factual question as the choice, for example, of an appropriate starting salary for Mrs. Feldman. The latter involves a decision of significance only in the present case; the former is a matter of great importance in all cases where lost earning capacity is a factor, since the discount rate is closely connected with the issue of whether inflated earnings should be explicity considered by the trier of fact. The defendant does not quarrel with the precision and thoroughness with which the trial court has explained its position; the defendant does quarrel with the policy decisions made by the trial court.

To minimize these policy decisions from a broad review by the "clearly erroneous" doctrine is not wise. Another district judge in this circuit, with different views or different economic experts, might use uninflated earnings and a 6% discount rate. Such a conclusion would cut the present judgment in half. While this court could not say what an appropriate discount rate in a 1984 trial might be, appellate court guidelines for use in trials today would tend to narrow the extreme differences in dollar amounts found in the testimony of economic experts.

Presumably this court agreed with the need for some uniformity in *Alexander v. Nash-Kelvinator Corp.*, 271 F.2d 524, when it criticized a 2½% discount rate. Other circuits have also explored this issue and have ruled against use of inflation in determining future damages. See *Sleeman v. Chesapeake & Ohio Ry Co.*, (6th cir.), 414 F.2d 305, 308:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influences on future damages as inflation and deflation."

See also *Magill v. Westinghouse Electric Corp.*, (3d Cir.) 464 F.2d 294, 301:

> "We note, however, that the concepts of inflation and the declining value of the dollar have been almost universally rejected as providing support for the earnings increase factor."[1]

See also *Williams v. U.S.*, (1st Cir.) 435 F.2d 804, 807:

> "Particularly in considering predictions of an accumulated estate, which if there is inflation, must be adjusted for possibly inflated expenses as well as earnings, we consider such speculation inadmissible."

These policy decisions must be altered as required by the controlling decisions of the state Supreme Courts; see *Pierce v. New York Central RR*, (6th cir.) 409 F.2d 1392, 1399; but the only Connecticut Supreme Court decision which says anything of significance about inflation is *Quednau v. Langrish*, 144 Conn. 706, 137 A.2d 544. It is noteworthy that *Quednau* cites the same section from Harper and James that this Court did in *McWeeney v. New York, N.H. and H.R.R. Co.*, 282 F.2d 34 for the proposition that:

> "Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25.11 (1956)" 282 F.2d at 38.

This appears also to be the rule in the Fifth Circuit, *see Johnson v. Penrod Drilling Co.*, 469 F.2d 897, rehearing granted, 478 F.2d 1208, as construed by *Higginbotham v. Mobil Oil Corp.*, (W.D. La.) 360 F. Supp. 1140, 1150, and *In re Farrell Lines Inc.* (S. D. Ga.) 378 F. Supp. 1354, 1359.[2]

A recent decision of the Sixth Circuit, *Bach v. Penn Central Transportation Co.* 502 F.2d 1117, 1122, somewhat

(1) Cf. *Frankel v. Heym*, (3rd Cir.) 466 F.2d 1226, 1229.

(2) As of February 25, 1975, *Johnson* was still under consideration by the Fifth Circuit *en banc*.

dilutes the language of *Sleeman*, but *Bach* still gives scant comfort to the Feldman estate:

> "In recent history inflation has been so persistent that it is difficult to conceive that the purchasing power of the dollar might remain constant through the year 2000. On the other hand the predictive abilities of economists have not advanced so far that they can forecast with any certainty the existence and rate of inflation for the next thirty years."

In *Bach* the plaintiff's expert was prepared to testify that, because of inflation, the plaintiff's salary would have gone from $13,496 to $49,413.12 in the year 2002. In the present case, the trial court was actually finding that Mrs. Feldman's salary, with an adjustment for inflation, would be $122,823 in the year 2011 (see defendants blue brief, p. 8). Such evidence was disapproved in *Bach*. See also *Amerco Marketing Co. of Memphis, Inc. v. Myers*, (6th Cir), 494 F.2d 904, 912, where the plaintiff's expert made no adjustment for inflation.

In his brief the plaintiff cautions against relying heavily on cases that were decided a decade ago because the economy was far stabler then. (br. 41). But so were interest rates. And the principal purpose of this reply brief is to bring to this court's attention circuit court cases which have been decided well within the past ten years.

The defendant will conclude with a reference to a 1973 Third Circuit case which reaffirms *Magill. Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 143-44 notes that the plaintiff's expert, while an economist, was used as an actuary only. The court was reluctant to permit inflationary calculations on such basis, if at all. The plaintiff was only looking for what by *Feldman* standards would be considered a modest inflationary yearly increase of 6%.

Allegheny's first objection to the introduction of economic trends in this case was that the plaintiff's expert was only an actuary (app. 183a; cf. 177a-180a). Thus, even if this

court is sympathetic to claims concerning inflation (cf. *McWeeney* at p. 38, decided in those supposedly far more stable times more than a decade ago), this is not the case to set such a precedent.

2. Claims Not Raised at Trial

Confronted with meritorious criticism of the trial court's decision, the plaintiff on two occasions claims the defendant never raised the issue at trial (br. 21-22 on government pay scales; br. 48 on vicissitudes). The problem is that the trial court simply went off on its own and the decision bears little resemblance to the case presented by either the plaintiff or the defendant.

Consider the pay scales problem. Since Mrs. Rodman spoke of starting Mrs. Feldman at GS-10, and since the plaintiff's actuary assumed she would start there (app. 196a), the defendant understandably did not pay much attention to what might happen if Mrs. Feldman were to start at GS-12.

The vicissitudes of life are subject to the same comment. The plaintiff presented a relatively (compared to the judgment) conservative case of lost earning capacity ($253,424, see App. 196a). The defendant should not be expected to rebut an issue that the plaintiff was never really vulnerable on in the presentation of his own case. Not until the trial court went far beyond the plaintiff's computations did the vicissitudes of life become important. Furthermore the plaintiff misconceives the defendant's argument. That Mrs. Feldman's life expectancy would take her past age 65 is not the issue. She might still have died before then, and this should have some effect on the judgment. She might also have lived longer than her expectancy, but this would not increase her earning capacity, since by then she would have retired.

CONCLUSION

The plaintiff has not effectively rebutted the defendant's claims of error. A new trial or a substantial remittur should be ordered.

Respectfully submitted,

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Re: Docket No.: 74-2299

Reid L. Feldman, Adm'r. vs. Allegheny Airlines, Inc.

Gentlemen:

This is to certify that I have mailed three copies each of the enclosed Reply Brief today to John W. Douglas, Esq., and Peter B. Cooper, Esq.

Very truly yours,

Wesley W. Horton

rjd
Enclosures

cc: John W. Douglas, Esq.
Peter B. Cooper, Esq.